

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

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SENATE BILL 759

Short Title: Unfair Cigarette Sales Act.

(Public)

Sponsors: Senators Speed, Davis, Parnell, Ballance, Carpenter, Albertson, Carrington, Clark, Foxx, and Forrester.

Referred to: Commerce

April 19, 1995

1 A BILL TO BE ENTITLED
2 AN ACT TO PROHIBIT THE UNFAIR BUSINESS PRACTICE OF PRICING
3 CIGARETTES BELOW COST.

4 The General Assembly of North Carolina enacts:

5 Section 1. Chapter 75 of the General Statutes is amended by adding a new
6 Article to read:

7 **"ARTICLE 4.**

8 **"UNFAIR CIGARETTE SALES.**

9 **"§ 75-100. Findings of fact; purpose.**

10 (a) The General Assembly finds that:

11 (1) Cigarettes, due to their standardized character, their great popularity,
12 their widespread and varied types of markets and methods of
13 distribution, and the sensitivity of their distribution to price fluctuations,
14 possess a distinct marketing character. The problems created by the sale
15 of cigarettes below cost, due to the economic facts and circumstances
16 peculiar to the distribution of cigarettes, require special and
17 individualized treatment.

18 (2) The sale of cigarettes below cost for the purpose of destroying or
19 substantially lessening competition prevents the State from collecting in

1 an orderly and efficient manner excise tax on cigarettes and taxes from
2 the licensing of persons engaged in the sale of cigarettes at wholesale
3 and retail.

4 (3) The sale of cigarettes below cost for the purpose of destroying or
5 substantially lessening competition is an unfair business practice, which
6 has an effect on the sale and distribution of cigarettes and ultimately
7 fosters monopoly and high price by tending to force independent
8 distributors and retail dealers out of business.

9 (b) It is the policy of this State, in order to promote the public welfare, to prohibit
10 the sale of cigarettes below cost. The purpose of this Article is to implement this policy.

11 **"§ 75-101. Definitions.**

12 As used in this Article, unless the context requires otherwise:

13 (1) 'Cigarette' means tobacco, irrespective of size or shape, whether or not
14 the tobacco is flavored, adulterated, or mixed with any other ingredient,
15 the wrapper or cover of which is made of paper or any other substance
16 that is not tobacco.

17 (2) 'Cost to the distributor' means the invoice price stated on the invoice for
18 the cigarettes received by the person liable for the tax on cigarettes, less
19 any discount or allowance for those cigarettes reflected on the invoice,
20 plus: any enforcement and administration fee under G.S. 75-110 and
21 any taxes imposed on the cigarettes by State or local government. 'Cost
22 to the distributor' does not include any cash discount for making
23 payment within a particular period of time.

24 (3) 'Cost to the retail dealer' means the invoice price stated on the invoice
25 for the cigarettes received by the retail dealer plus any taxes imposed on
26 the cigarettes by State or local government. 'Cost to the retail dealer'
27 does not include any cash discount for making payment within a
28 particular period of time.

29 (4) 'Distributor' has the same meaning as in G.S. 105-113.4.

30 (5) 'Retail dealer' has the same meaning as in G.S. 105-113.4.

31 (6) 'Secretary' means the Secretary of Revenue.

32 (7) 'Sell at retail', 'sale at retail', and 'retail sales' mean any sale for
33 consumption or use made in the ordinary course of trade or usual
34 conduct of the seller's business.

35 (8) 'Sell at wholesale', 'sale at wholesale', and 'wholesale sales' mean and
36 include any sale made in the ordinary course of trade or usual conduct
37 of the distributor's business to a retail dealer for the purpose of retail.

38 **"§ 75-102. Sale at less than cost prohibited; criminal penalties.**

39 (a) It is unlawful for any distributor or retail dealer to sell, at wholesale or retail,
40 cigarettes at less than cost to the distributor or cost to the retail dealer for the purpose of
41 destroying competition or substantially lessening competition.

42 (b) It is unlawful for any distributor or retail dealer to take any action, at wholesale
43 or retail, that would have the effect of selling cigarettes at less than cost to the distributor

1 or cost to the retail dealer for the purpose of destroying competition or substantially
2 lessening competition.

3 (c) Any distributor or retail dealer who violates this section shall be guilty of a
4 Class 1 misdemeanor. Each sale or purchase by a distributor or retail dealer at less than
5 cost is a separate violation. Each action by a distributor or retail dealer that would have
6 the effect of selling cigarettes at less than cost to the distributor or cost to the retail dealer
7 is a separate violation.

8 (d) Sale of cigarettes by a distributor or retail dealer at less than cost to it is prima
9 facie evidence of intent to destroy or substantially lessen competition.

10 **"§ 75-103. Combination sales.**

11 In any sale involving two or more items at a combined price, at least one of which
12 items is cigarettes, neither the distributor's nor the retail dealer's combined selling price
13 shall be below the combined cost to the distributor or the combined cost to the retail
14 dealer for all items included in the transaction.

15 **"§ 75-104. Exemptions.**

16 The provisions of this Article shall not apply to any of the following sales at
17 wholesale or sales at retail:

18 (1) In an isolated transaction and not in the usual course of business.

19 (2) Where cigarettes are sold in a bona fide clearance sale for the purpose of
20 discontinuing trade in the cigarettes.

21 (3) Where cigarettes are sold as imperfect or damaged.

22 (4) Where cigarettes are sold upon the final liquidation of a business.

23 (5) Where cigarettes are sold by any fiduciary or other officer acting under
24 the order or direction of any court.

25 **"§ 75-105. Transactions to meet lawful competition that are permitted.**

26 Any distributor may sell cigarettes to a regular customer at a price made in good faith
27 to meet the legal price of a competitor selling to the same customer. Any retail dealer
28 may sell cigarettes at a price made in good faith to meet the legal price of a competitor.
29 For sales of cigarettes that are exempt under G.S. 75-104, the price of the cigarettes shall
30 not be considered the price of a competitor and shall not be used as a basis for
31 establishing prices below cost. The price established at a bankruptcy sale shall not be
32 considered the price of a competitor.

33 **"§ 75-106. Sales contracts in violation of this Article.**

34 Any contract, express or implied, made by any person in violation of any of the
35 provisions of this Article, shall be void, and that person shall not be allowed to recover
36 any damages under that contract.

37 **"§ 75-107. Sales outside ordinary channels of business.**

38 The invoice cost or the actual cost of any cigarettes purchased at a forced, bankrupt,
39 or closeout sale, or other sale outside of the ordinary channels of trade shall not be used
40 to establish the cost to the distributor or to the retail dealer.

41 **"§ 75-108. Actions for violations or threatened violations; remedies.**

42 (a) The Attorney General, any person injured by violation of this Article, any
43 person who may suffer injury from any threatened violation of this Article, or any trade

1 association that is representative of such injured person or person threatened with injury
2 may bring an action for injunctive relief in any court of the General Court of Justice.

3 (b) The court shall award the cost of the suit, including reasonable attorneys' fees,
4 to a prevailing plaintiff.

5 (c) It is not necessary to allege or prove actual damages to the plaintiff to obtain
6 the relief under subsection (a) or (b) of this section, but if alleged and proved, the plaintiff
7 shall recover these damages in addition to any other relief under subsection (a) or (b) of
8 this section.

9 **"§ 75-109. Powers and duties of the Attorney General; revocation of licenses.**

10 (a) The Attorney General may adopt rules for the enforcement of this Article.

11 (b) If any person licensed under G.S. 105-113.12 or G.S. 105-102.5(b)(7) fails to
12 comply with any provisions of this Article, the Secretary may revoke that license. The
13 provisions of G.S. 105-113.16(b) apply to a revocation of a license under this section.

14 **"§ 75-110. Payment of enforcement and administration fee by distributor; special**
15 **account; fee deemed an additional cost.**

16 (a) To provide for the cost of administering and enforcing this Article, every
17 cigarette distributor licensed under G. S. 105-113.12 shall pay an enforcement and
18 administration fee to the Secretary on a monthly basis, for each package of 20 cigarettes
19 on which the North Carolina cigarette tax was paid during the month under G.S. 105-
20 113.18. This fee shall not exceed one-tenth cent (.1¢) for each package of 20 cigarettes.
21 Every fiscal year the Secretary shall calculate the enforcement and administration fee and
22 notify those licensed distributors who are liable for this fee. Payments to the Secretary
23 shall be made according to the provisions of G.S. 105-113.18 and shall be subject to the
24 same penalties and interest as are levied on cigarette taxes not paid on or before the due
25 date.

26 (b) The Secretary shall transfer all funds collected as cigarette enforcement and
27 administration fees, less the cost to the Secretary for administering the collection of the
28 fees, to the Office of the Attorney General, to be used for the cost to the Office of the
29 Attorney General of administering and enforcing this Article."

30 Sec. 2. This act becomes effective October 1, 1995, and applies to sales of
31 cigarettes made on or after that date.